

**LIM BOCK LAI v. SELCO (SINGAPORE)
PTE. LTD.**

[O.C.J. (Lai Kew Chai J.) August 27, 1987]

[Singapore — Originating Summons No. 697 of 1986]

Practice and Procedure — Admiralty in rem — Issue of writs against vessels owned by company — Company subsequently wound up — Whether plaintiff a secured creditor — Whether plaintiff allowed to pursue claim in rem — High Court (Admiralty Jurisdiction) Act (Cap. 123, 1985 Ed.), ss. 3(1) & 4(4) — Companies Act (Cap. 50, 1985 Ed.), ss. 255(2) & 262(3).

Company Law — Winding up of company — Issue of writs against vessels owned by company prior to winding up — Whether plaintiff a secured creditor — Whether plaintiff allowed to pursue claim in rem — Companies Act (Cap. 50, 1985 Ed.), ss. 252(2) & 262(3) — High Court (Admiralty Jurisdiction) Act (Cap. 123, 1985 Ed.), ss. 3(1) & 4(4).

The plaintiff, a bunk supplier, sought leave to continue and pursue any of the remedies which he can lawfully pursue in respect of three Writs of Admiralty in which he was the plaintiff and the defendants were sued as the owners of motor vessels "Salversatile," "Salvenom" and "Salvail" at the time those writs were filed, notwithstanding that the defendants had been wound up.

The facts were as follows. The plaintiff claimed that in September and October 1985, he had at the request of the defendants supplied bunkers at US\$ 125,052.78 to the vessels known as "Selco Air Manis," "Salvirile" and "Salviscount." The plaintiff submitted when he supplied the bunkers to the above-named three vessels these vessels were chartered to or in the possession or control of the defendants.

The plaintiff had filed and issued the writs in admiralty *in rem* before the commencement of the winding up or compulsory liquidation of the defendants, although none of the said writs had been served before such liquidation.

The plaintiff submitted that since the plaintiff had issued the three admiralty writs before the commencement of the winding up of the company, the plaintiff, though having what is generally referred to as the statutory right of action *in rem* and was not holder of any maritime lien, was nonetheless a secured creditor so far as the three vessels named in the writs were concerned.

Held, allowing the plaintiff's application: (1) the issue of a writ *in rem* in exercise of what has been generally referred to as the statutory right of action *in rem* has crucial consequences which enure to the benefit of such plaintiffs. Their claims are not affected by any subsequent changes of ownership;

(2) if the court was right that the plaintiff was in this sense a "secured creditor" this fact was also a substantial consideration in the exercise of the court's discretion. The court would grant leave to the plaintiff to continue the relevant actions *in rem*.

Cases referred to:

(1) *In re Aro* [1980] 1 Ch. 196.

- A (2) "The Monica S." [1968] P. 741.
(3) "The Helene Roth" [1980] 1 Q.B. 273.
(4) *The "Permina 108"* [1977] 1 M.L.J. 49.
(5) *The St. Elefterio* [1957] 1 Lloyd's Rep. 283, 287.

ORIGINATING SUMMONS.

B Richard Kuek Chong Yeow for the plaintiff/applicant.

Ms Yvonne Tan for the defendants/respondents.

Cur. Adv. Vult.

C Lai Kew Chai J.: By this originating summons the plaintiff, a bunker supplier, is seeking leave to continue and pursue any of the remedies or do any act which he can lawfully pursue in respect of three Writs of Admiralty in which he is the plaintiff and the defendants were sued as the owners of motor vessels "Salversatile," "Salvenom" and "Salvail" at the time those writs were filed, notwithstanding that the defendants have been wound up.

E His application is made under sub-section (3) of section 262 of the Companies Act (Cap. 50, 1985 Ed.) which reads as follows:

"262(3) When a winding up order has been made or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company except —

- F (a) by leave of the Court; and
(b) in accordance with such terms as the Court imposes."

The facts, except in respect of those surrounding a subsidiary issue to which I will revert, are not materially in dispute. The plaintiff says that in the months of September and October 1985 he had at the request of the defendants supplied bunkers at the total price of US\$125,052.78 to the vessels known as "Selco Air Manis," "Salvirile" and "Salviscount." These vessels are not the subject matter of the *in rem* proceedings featuring in this case. The plaintiff further says that although these ships were not owned by the defendants the defendants for their own account and as the principal had ordered and purchased the bunkers which were delivered to the three vessels either owned or bareboat chartered by companies within the well-known but now collapsed group of companies called the Pan-Electric Group and of which the defendants were a member. Accordingly, the plaintiff asserts that the defendants were all material times the person liable *in personam* within the meaning of section 4(4) of the High Court

(Admiralty Jurisdiction) Act (Cap. 123, 1985 Ed.). In other words, the plaintiff says that when he supplied the bunkers to the abovenamed three vessels these vessels were chartered to or in the possession or control of the defendants.

On December 3, 1985, the plaintiff issued three writs in Admiralty in Rem and they are (1) Admiralty in Rem No. 747 of 1985 against the defendants' ship "Salversatile" for the price of bunkers supplied to "Salviscount"; (2) Admiralty in Rem No. 748 of 1985 against the defendants' ship "Salvenom" for the price of the bunkers supplied to "Salvirile"; and (3) Admiralty in Rem No. 750 of 1985 against the defendants' ship "Salvail" for the price of bunkers supplied to "Selco Air Manis." The plaintiff did not serve these writs and it follows that he did not arrest any of the vessels.

On January 2, 1986, a creditor of the defendants filed a Companies Winding Up Petition No. 1 of 1986 against the defendants. On June 4, 1986, the High Court ordered the winding up of the company and by virtue of section 255(2) of the Companies Act (Cap. 50, 1985 Ed.) the winding up of the defendants was deemed to have commenced on January 2, 1986, which was just under a month after the plaintiff had filed the three admiralty *in rem* writs mentioned earlier. In other words, the plaintiff had filed and issued the three writs in admiralty *in rem* before the commencement of the winding up or compulsory liquidation of the defendants, although none of the said writs had been served before such liquidation and it follows that none of the three vessels was arrested.

It could be, as in this case, a matter of vital importance to creditors such as the plaintiff whether their claims would be allowed to be pursued in a court exercising its admiralty jurisdiction or whether their claims would be dealt with in the liquidation of corporate owners of vessels in accordance with the priorities accorded to unsecured creditors who share the common pool after the secured creditors are paid. In the former case, of course, generally there are fewer and less substantial creditors whose claims are limited to those which come within sub-section (1) of section 3 of the High Court (Admiralty Jurisdiction) Act (Cap. 123, 1985 Ed.). That, at any rate, is the position of the plaintiff in this case.

Learned counsel for the plaintiff submitted that since the plaintiff had issued the three admiralty writs before the commencement of the

A winding up of the company, the plaintiff, though having what is generally referred to as the statutory right of action *in rem* and is not holder of any maritime lien, is nonetheless a secured creditor so far as the three vessels named in the writs are concerned. He relied on *In re Aro*.⁽¹⁾ The plaintiffs in that case had issued a writ in the Admiralty Court staking their claims for damages to their cargo of oil carried by the ship 'Aro' prior to the winding up of its owners, a Liberian company. The writ was also not served. The 'Aro' was already under arrest and in accordance with the practice the plaintiffs filed a caveat against the release of the 'Aro.' The plaintiffs therefore applied for leave from the Companies Court to continue their admiralty *in rem* action, intending thereby to improve their recovery rate per pound and to keep themselves out of having to prove in company liquidation in the usual way and having to share far less in the pound. By a cross summons, the liquidator of the shipowning company sought the court's determination on the question, *inter alia*, whether the plaintiffs in the circumstances I had recited were entitled to the funds out of the eventual sale of the vessel in priority to their claims as liquidators of the company.

In re Aro was the first case where it was necessary for its decision to distinguish between the time when the writ *in rem* was issued, that is at the institution of the suit, on the one hand and the time and fact of service of the writ or of the fact of arrest of the vessel on the other. The position in law prior to this case was not altogether clear.

Oliver J. (as he then was) in a very instructive judgment decided that the plaintiffs in *In re Aro* did not become secured creditors at the time they filed the writ *in rem*. He reasoned that the issue of such a writ did not "invoke" the jurisdiction of the Admiralty Court but was merely the first of several steps towards invocation: see the analysis of Brightman L.J. (also as he then was) who delivered the judgment of the Court of Appeal in *In re Aro Co. Ltd. (supra)* at 208E-209B.

The Court of Appeal overruled Oliver J. and held at p. 209B to D/E as follows:

I "In our judgment there is no particular reason for equating the date of the creation of the status of a secured creditor with the date when the Admiralty jurisdiction can be said to be "invoked" for the purposes of section 3 of the Administration of Justice Act 1956. It seems more logical to test the position of the plaintiffs by asking whether, immediately before the presentation of the winding up petition, they could properly assert as against all the world,

that the vessel Aro was security for their claim, not whether they could assert that they had invoked the jurisdiction of the Admiralty Court within the meaning of section 3 of the Act of 1956. If it is correct to say, as was not challenged in the court below and is not challenged in this court, that after the issue of the writ *in rem* the plaintiffs could serve the writ on the Aro, and arrest the Aro, in the hands of a transferee from the liquidator and all subsequent transferees, it seems to us difficult to argue that the Aro was not effectively encumbered with the plaintiffs' claim. In our judgment the plaintiffs ought to be considered as secured creditors for the purpose of deciding whether or not the discretion of the court should be exercised in their favour under section 231."

The issue of a writ *in rem* in exercise of what has been generally referred to as the statutory right of action *in rem* has crucial consequences which enure to the benefit of such plaintiffs. Their claims are not affected by any subsequent changes of ownership: see the famous cases of "*The Monica S.*"⁽²⁾ and "*The Helene Roth.*"⁽³⁾ These decisions account for the usual provisions in agreements for sales of ships whereby sellers would have to indemnify buyers against losses and claims from such plaintiffs and also account for the prudent practice of searching the Supreme Court Registry's register of actions *in rem* against vessels.

Learned counsel for the defendants sought to distinguish this case from *In re Aro* by pointing to the procedural facts that the plaintiff in this case had only filed the writs *in rem* and had not lodged any caveat against the release of the vessels concerned. Learned counsel further stressed that this exceptional feature, namely the filing of a caveat against release of the vessel, which had prompted the Court of Appeal to adopt the alternative approach of granting leave to the plaintiffs in *In re Aro* to continue the action *in rem* was to avoid the suggested practice of effecting second and further arrests of the vessel instead of plaintiffs being content, as has been the practice so far, merely to file caveats against the releases of vessels from arrests. These submissions run counter to the principal reason given by the Court of Appeal in *In re Aro* and for the principal reason given by them, I am of the view that there is no difference in the attempted distinction.

If I be right that the plaintiff is in this sense a "secured creditor" this fact is also a substantial consideration in the exercise of my discretion. In all the circumstances, I exercise my statutory discretion and grant leave to the plaintiff to continue the relevant actions *in rem*.

I now return to the subsidiary issue I had men-

A tioned earlier. Through the affidavit of Mr. Alan Bond it was alleged that both the vessels "Salvire" and "Salviscount" were bare-boat chartered to Selco Salvage Ltd, that therefore the defendants were not the charterers and that the role of the defendants were limited solely to the procurement of supplies for the companies within the Selco group of companies, subject to reimbursements by the relevant companies. In the circumstances, the defendants contended that they were not the persons liable *in personam* to the plaintiff, seeing that the defendants were not at the times when the causes of action arose either the owners or charterers of the relevant ships. They relied on "*The Permina 108.*"⁽⁴⁾

For the plaintiff learned counsel observed that it was noteworthy that the defendants had not disclaimed any possession or control of the two vessels, either of which could warrant the invocation of the court's admiralty jurisdiction. He pointed out that the evidence on the management, crewing and manning of the vessels and on the relationship between the defendants and the bare-boat charterers had to be investigated and this could be done only after discovery and the administration of interrogatories. It is clear to me that the plaintiff is right and that at this threshold stage the defendants are not entitled to shut him out of his claims against the defendants: see *The St. Eleftherio*.⁽⁵⁾

F Accordingly, there will be an order in terms of the originating summons with costs to the plaintiff.

Application allowed.

G Solicitors: *Prakash Gurbani & Chong; Shook Lin & Bok.*

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